each official has sworn to uphold the Constitution, and a court may well be reluctant to force him to do an act which may be in violation of his oath and detrimental to the rights of the people.[5] Much depends, necessarily, upon the facts in each particular case. Where the validity of the statute appears to be doubtful, the great weight of authority is that the court will consider the defense.[6] Especially is this true where the official will incur a personal liability if the statute is later declared invalid, as in the case of an auditor who is compelled to pay out money.[7]

When, however, a state official appeals from a state court to a federal court, a different problem is presented. The decision of the court of last resort of the state is binding on the Supreme Court of the United States unless a federal question is involved.[8] In a recent case where a county court was prevented from levying a tax by virtue of a statute which it claimed to be unconstitutional, and where the constitutionality of the statute had been upheld by the highest court of the state, the federal Supreme Court refused to take jurisdiction on the ground that, since the appellant's interest was official and not personal, no federal question was involved. *Braxton County Court* v. *West Virginia*, 208 U. S. 192. Even though the official is liable for costs in the state suit, this pecuniary interest will not be sufficient to raise a federal question under the Fourteenth Amendment, since the liability for costs does not affect the merits of the case.[9] It is believed that the same result would be reached, though the official might later become personally liable for his acts under the statute, as in the case of a tax-collector collecting under an unconstitutional law. Though the erroneous decision of the state court might prove disadvantageous to him, such a decision does not give him an appealable interest, since he is not directly affected.

LIABILITY FOR NEGLIGENT MISREPRESENTATIONS. — Whether or not an action can ever be maintained for the negligent use of language is a question on which there seems to be no conclusive authority. It is, however, raised squarely by a recent Ohio decision. A demurrer was sustained to a petition alleging that the defendant company was engaged in making abstracts of title to realty; that it was customary for purchasers of realty, even though under no contract relation with the defendant, to rely on these abstracts; and that the plaintiff was damaged by acting on a negligently defective abstract made by the defendant. *Thomas* v. *Guarantee Title & Trust Co.*, Circ. Ct. Cuyahoga Co., Nov. 18, 1907. It seems clear that the mere existence of a custom to rely on such abstracts is not sufficient basis for a contract relation[1] and that, in spite of some decisions which appear to leave the matter in doubt,[2] the plaintiff could not recover in an action for deceit.[3] If the plaintiff is to recover, therefore, negligent use of language must be the basis of the action. It has been held that a lawyer is not liable for the results of a negligent mistake in a casual opinion given to one not a

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[5] Van Horn *v.* State, 46 Neb. 62.
[6] See 6 Am. & Eng. Encyc., 2 ed., 1090.
[7] Denman *v.* Broderick, 111 Cal. 96.
[8] Rasmussen *v.* Idaho, 181 U. S. 198.
[9] Smith *v.* Indiana, 191 U. S. 138.

[1] Savings Bank *v.* Ward, 100 U. S. 195. *Cf.* Dickle *v.* Abstract Co., 89 Tenn. 431, allowing recovery where the defendant knew that the plaintiff would so rely.
[2] Krause *v.* Busacker, 105 Wis. 350.
[3] Peek *v.* Derry, 14 App. Cas. 337. See 14 HARV. L. REV. 185.

client.[4] Although that case can be distinguished on the ground that the plaintiff was not reasonable in relying on the opinion, there are dicta to the effect that no such action will lie.[5] Nevertheless, from principles laid down in analogous cases it would seem that the demurrer in the present case should have been overruled.

The problem depends on whether or not there is a duty to use care as to the accuracy of representations. Undoubtedly such a duty does not exist under all circumstances, but a review of the decisions makes it equally certain that at times such a duty does exist. There may be a duty imposed by statute, as in the case of recording clerks. Then if the clerk negligently fails to record a mortgage, he is liable to a plaintiff who relied on the record to his damage.[6] And apart from statute, in this country telegraph companies are considered to owe such a duty to the public that the recipient of a telegram may recover for losses caused by negligent mistakes made in transmission.[7] The courts also find there is a breach of duty where the misrepresentation imperils the lives of others.[8] An attempt has been made to confine the duty to use care in making representations to cases where "the act is one imminently dangerous to the lives of others or is an act performed in pursuance of some legal duty."[9] Other decisions, however, show that this limitation is not sound. Physicians have been held liable to persons with whom there was no privity of contract for the results of negligent opinions which were not imminently dangerous to life.[10] It has even been held that a druggist is similarly liable for negligently and falsely representing a hair tonic as harmless.[11] The position of the abstract company can be distinguished only on the ground that the damage caused is pecuniary instead of physical, and such a distinction seems untenable. In both cases the plaintiffs were reasonable in relying on the statement; in both the defendants knew persons such as the plaintiffs would rely on the statements and would probably be damaged if the statements were false. It is submitted, therefore, that a similar duty to use care should be imposed on the defendants in both cases.[12]

RECENT CASES.

ADMIRALTY — DECREES — CHANGE IN TITLE IN CONDEMNED PRIZE. — The plaintiff sued on a policy of marine insurance for loss of his ship by perils of the sea. The ship was captured during the Russo-Japanese war by a Japanese cruiser, but was wrecked on the Japanese coast before reaching port. Subsequently the wreck was condemned as a prize. *Held*, that the insured cannot recover, because the ship was lost by capture at the time of its seizure irre-

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[4] Fish *v.* Kelly, 17 C. B. (N. S.) 194.

[5] See Angus *v.* Clifford, [1891] 2 Ch. 449, 470; Le Lievre *v.* Gould, [1893] 1 Q. B. 491, 501.

[6] Appleby *v.* State, 45 N. J. L. 161.

[7] Western Union Tel. Co. *v.* Dubois, 128 Ill. 248.

[8] Thomas *v.* Winchester, 6 N. Y. 397. The defendant who negligently sold a dangerous drug as harmless was held liable to a third party with whom there was no privity of contract.

[9] Savings Bank *v.* Ward, *supra*, 206. See 57 Am. Dec. 461, n.

[10] Edwards *v.* Lamb, 69 N. H. 599; Harriott *v.* Plimpton, 166 Mass. 585.

[11] George *v.* Skivington, L. R. 5 Exch. 1.

[12] *Cf.* 14 HARV. L. REV. 184–99.